



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 14, 1996

Mr. Merrill E. Nunn
City Attorney
City of Amarillo
P.O. Box 1971
Amarillo, Texas 79105-1971

OR96-2100

Dear Mr. Nunn:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 101976.

The Amarillo Economic Development Corporation (the "corporation") received two open records requests for information pertaining to a contract/grant recently received by Advanced Display Systems, Inc. ("ADS") to build a manufacturing facility in Amarillo, Texas. You have requested an open records decision from this office pursuant to section 552.305 of the Government Code with regard to certain proprietary information regarding ADS.¹ You also contend that other requested records held by the corporation are excepted from required public disclosure under sections 552.107 and 552.111 of the Government Code.

In accordance with the practice this office established in Open Records Decision No. 575 (1990), this office notified representatives of ADS that we received your request for an open records decision regarding information it submitted to the corporation. In our notification, this office requested an explanation as to why certain information pertaining to ADS was excepted from public disclosure, with the caveat that unless we received such explanation within a reasonable time, this office would instruct the corporation to disclose the information. ADS has timely responded to our notification and submitted arguments as to why the information at issue should be withheld from the public pursuant to section 552.110 of the Government Code.

¹Although you also raised section 552.104 of the Government Code with regard to some of the requested information, we need not consider the applicability of this exception because we resolve this issue on other grounds.

The first open records request received by the corporation specifically seeks the "name/identity and address of the global manufacturer with which Advanced Display Systems has a contract." You state that the only documents held by the corporation that contain the name of ADS' financial partner are certain intra-office memoranda.² ADS contends that the name of the financial partner constitutes "commercial or financial information" and thus asks that this information be withheld from the public pursuant to section 552.110 of the Government Code.

Section 552.110 of the Government Code excepts from required public disclosure

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The identity of a financial partner is clearly "commercial" information. To fall within section 3(a)(10), however, it must be "privileged or confidential by statute or judicial decision."

Section 552.110 is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. section 552 *et. seq.* Open Records Decision Nos. 639 (1996), 309 (1982), 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) involves considering the possible effects of the release of the information:

a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have *either* of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; *or* 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis added.)

National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

As to the first effect, the governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. You have expressed no opinion on this subject. As to the second effect, the courts have held that

in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. *Actual competition and the likelihood of substantial competitive injury* is [sic] all that need be shown. (Emphasis added.)

²When a requestor does not request specific records, a governmental body should make a good faith effort to relate the request to existing documents and advise the requestor of the type of documents available in order to clarify the request. See Open Records Decision No. 87 (1975).

Gulf & Western Industries v. United States, 615 F.2d 527, 530 D.C. Cir. 1979); *see also National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976). "Conclusory and generalized allegations" of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. *See National Park v. Kleppe*, 547 F.2d 673, 680. In this instance, however, ADS has made specific and concrete arguments as to why the release of the identity of its financial partner at this time would result in substantial competitive harm.³ We therefore conclude that the corporation must withhold this information as "commercial information" pursuant to section 552.110 of the Government Code.

A second requestor has sought the following records from the corporation:

ADS' request, submissions, and representations made to obtain the grant;

documents relating to the considerations undertaken to approve the grant;

the requirements and rules pertaining to the grant; and any other public documents relating to the grant.

You state that some of the requested information has been released to the requestor. You seek to withhold some of the requested documents, however, pursuant to sections 552.107 and 552.111 of the Government Code.

You contend that a report prepared by an attorney for the corporation pertaining to "various legal matters relating to" ADS is excepted from required public disclosure by section 552.107(1) of the Government Code, which protects information that "an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See Open Records Decision No. 574* (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* The report you have submitted to this office consists of the attorney's legal opinion to his client and as such is protected by the attorney-client privilege. The corporation therefore may withhold this record pursuant to section 552.107(1).

You have also submitted to this office certain intra-office memoranda and the handwritten notes on which they were based, contending that these records are excepted from required public disclosure under section 552.111 of the Government Code.⁴ Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but

³ADS informs us, however, that the identity of the financial partner will be released to the public in the future.

⁴Most of the memoranda you submitted to this office appear to be in the form of "updates" pertaining to a variety of subjects, including the ADS grant. For purposes of this ruling, we assume that only those portions of the memoranda and handwritten notes pertaining to the ADS grant are responsive to the open records request. We do not address here whether the remaining portions of the memoranda and notes are subject to required public disclosure under the Open Records Act.

only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.).

We note, however, that much of the information contained in the memoranda is purely factual in nature. Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 (1993) at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). We have marked those portions of the intra-office memoranda that the corporation may withhold pursuant to section 552.111. On the other hand, we believe that the handwritten notes may be withheld in their entirety pursuant to section 552.111 except for any factual information contained therein that does not also appear in the final version of the memoranda. Cf. Open Records Decision No. 559 (1990) (draft documents excepted from public disclosure under section 552.111 under certain circumstances).

Finally, we address the ADS arguments for withholding other corporation documents coming within the ambit of the second open records request. ADS first informs us that these records

contain information obtained for or generated by the 'due diligence' process conducted by [the corporation] and are covered by the Confidentiality Agreement signed by [the corporation] and ADS in compliance to the agreement executed between ADS and its Alliance Partner.

We note that information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any contract between the corporation and ADS specifying otherwise.

ADS contends that documents designated Documents A-H are excepted from public disclosure under section 552.110. We have already discussed Documents A, B, and G above. ADS contends that Documents C and E "will provide insights to ADS' attorney 'work file.'" This contention does not, however, reflect a section 552.110 consideration; consequently, Documents C and E may not be withheld under section 552.110 and therefore must be released. Additionally, ADS makes no specific argument for withholding Documents D and F; accordingly, these two documents must also be released.

ADS' sole argument for withholding Document H, ADS' "Business Plan," which includes "strategies, tactics and projections," is that the release of this information "would result in . . . an unfair advantage [to an opposing party in litigation with ADS] and a denial of due process." Again, ADS has failed to demonstrate how this information is confidential under section 552.110. We, therefore, conclude that Document H must be released in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Open Records Division

KHG/RWP/rho

Ref.: ID# 101976

Enclosures: Marked documents

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